Editor's note: 83 I.D. 269

RODNEY ROLFE

AND

RONALD J. ROLFE

IBLA 76-377 Decided June 30, 1976

Appeal from decision of the District Office, Bureau of Land Management, Prineville, Oregon, canceling grazing leases 3605752 and 36057583 (No. OR-05-76-3).

Set aside and remanded.

1. Administrative Practice--Grazing Leases: Cancellation or Reduction--Notice: Generally--Trespass: Generally

When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser

sanctions have proven to be of no effect or when the nature of the violation demands such severity. However, a decision canceling a lease will be set aside where the District Manager relied upon alleged trespasses of which the lessees had no notice and which occurred after a show cause notice had issued, and the case will be remanded for further proceedings.

2. Administrative Procedure: Hearings--Grazing Leases: Generally--Rules of Practice: Appeals: Hearings

The regulations do not provide for hearings as a matter of right on trespass violations involving a section 15 grazing lessee. For the Board of Land Appeals to exercise its discretion under 43 CFR 4.415 and order a hearing, the appellant must allege facts which, if proven, would entitle him to the relief sought.

APPEARANCES: Keith A. Mobley, Esq., Phipps, Dunn & Mobley, The Dalles, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Rodney Rolfe and Ronald J. Rolfe appeal from the decision of the District Manager, Prineville, Oregon, District Office, Bureau of Land Management (BLM), dated November 4, 1975, canceling their grazing leases 3605752 and 36057583 (No. OR-05-76-3). Both leases were issued pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970): lease 3605752 to Rodney and Ronald Rolfe, effective January 17, 1975, and expiring March 31, 1978; lease 36057583 to Rodney J. Rolfe, effective June 10, 1975, and expiring February 29, 1976. In his decision, the District Manager found the appellants to be in default for violating the terms and conditions of their grazing leases by repeatedly allowing their livestock to be on Federal land different from that designated in their leases.

The record shows that appellants have been cited for trespass of their cattle on Federal land six times: once in June 1971 for 150 cattle; once in July 1972 for 6 cattle; twice in September 1974 for 10 cattle each time; once in November 1974 for 21 cattle; and once in July 1975 for 19 cattle. After notifying appellants of the July 1975 trespass, BLM issued a notice on August 5, 1975, demanding that appellants show cause why their grazing leases should not be canceled for repeated and willful trespass violations.

Appellants responded to the show cause notice by stating that the BLM grazing leases were essential to their cattle operation, that their cattle trespassed due to gates being left open and the poor fences in the area, and that they would not graze cattle in the "Water Gap area" until they built fences necessary to prevent trespass by their cattle.

The District Manager found appellants' arguments to be inadequate. He pointed out that the loss of the 77 AUMs authorized by appellants' grazing leases would only reduce the amount of feed and forage needed in appellants' cattle operation by approximately 4.6 percent per year. He dismissed the poor fences and open gates problem as failing to relieve appellants of the responsibility to prevent trespasses. Finally, the District Manager, while agreeing that fencing the Water Gap area could prevent further trespassing in the vicinity of the July 1975 violations, stated that this remedy would not relieve the problem in another area where appellants' cattle were observed trespassing in September and October 1975.

1/ BLM employees observed 10 of appellants' cattle trespassing on Federal land on September 24, 4 on October 2 and 4 on October 23. The District Manager stated in his decision that no trespass notices were issued because the administrative jurisdiction over the land at the time of the observations was uncertain. He further stated that the land was transferred to the National Park Service on October 8 and that therefore the first two of these violations were considered in evaluating the case.

In their statement of reasons, appellants deny any willful trespasses. They point out that the area in which their leases are located is poorly fenced and straying livestock are a constant problem. They describe the cooperative practice of the cattlemen in the area in dealing with this problem and submit affidavits to this effect. Finally, they argue that other solutions should be explored rather than canceling their leases.

The issue to be decided is whether appellants' grazing leases should be canceled. BLM has several options when considering what action to take against a grazing lessee whose livestock have trespassed on Federal land. Regulation 43 CFR 9239.3-1(b) states:

> A lessee who grazes livestock in violation of the terms and conditions of his lease by * * * allowing the livestock to be on Federal land in an area * * * different from that designated shall be in default and shall be subject to the provisions of § 4123.1 of this chapter. In addition he may be subject to trespass action in accordance with the practices and procedures in §§ 9239.3-2(a), 9239.3-2(c) (1), (2), (3), (4), 9239.3-2(d), and 9239.3-2(g) of this chapter * * *.

In his decision, the District Manager stated that appellants' grazing leases were canceled in accordance with 43 CFR 4125.1-1(h), which sets forth the procedures for applying the provisions of 43 CFR 4123.1. Regulation 43 CFR 4123.1 states:

> A grazing lease may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the grazing lease * * *.

The other regulations referred to in 43 CFR 9239.3-1(b) contain three additional actions which BLM may take against a lessee whose livestock are found to be trespassing. (These also apply to alleged trespassers who are not lessees. 43 CFR 9239.3-1(c)). BLM may assess damages at a certain rate for the value of the forage consumed by the trespassing livestock; the rate is doubled if the trespass grazing is deemed to be "clearly wilful, grossly negligent, or repeated." 43 CFR 9239.3-2(c)(2). Second, BLM may impound the trespassing livestock in certain situations. 43 CFR 9239.3-2(c)(3). Third, any willful violation may be punished by a fine of not more than $ 500. 43 CFR 9239.3-2(g).

[1] When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser sanctions have proven to be of no effect or when the nature of the violation demands such severity. See Coronado Development Corp., 19 IBLA 71 (1975); cf. Eldon Brinkerhoff, 24 IBLA 324, 335-37, 83 I.D. 185 (1976). Cancellation of a grazing lease may be the most effectual method BLM has to prevent future grazing trespasses by a lessee where trespasses have been repeated and willful and where there is little or no reason to believe that future trespasses may be prevented.

The record suggests that straying cattle have been an endemic problem in the area of appellants' leases for some time. 2/ BLM has issued several notices of trespass to appellants, as described above, and to other ranchers in the area. However, prior to the July 1975 violation, BLM assessed appellants for damages only at the standard rate, not at the doubled rate authorized by regulation for repeated violations. BLM issued the grazing leases to appellants in 1975, after appellants had been cited for several trespass violations.

The record also shows that in August 1975, the District Office initiated efforts to control the problem of straying livestock referred to by appellants in their statement of reasons. Letters were sent to the ranchers in the area requesting their assistance in this effort. Authority to impound trespassing livestock was requested, and received, from the BLM Oregon State Director. At the same time, show cause notices were sent to lessees, including appellants, whose livestock had been found trespassing.

On appeal, appellants have submitted affidavits and other information concerning their own and area range practices in dealing with strays. They have also indicated their willingness

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2/ The record contains a letter from the Wheeler County Sheriff to the National Park Service stating that Wheeler County has an open range law, i.e., an individual land owner must fence livestock out. The trespass violations all occurred in Wheeler County and one of the leases is located there.

to achieve a reasonable solution to prevent their cattle from straying, suggesting certain remedies, such as selling their cattle which now have a tendency to stray to certain areas and replacing them with new cattle. They make other statements in an attempt to mitigate the past trespasses.

We do not accept some of the excuses offered by appellants as mitigating factors. Despite local practices affecting private lands, unauthorized use of Federal lands by cattle, however, they come upon the land, constitutes a trespass. Cf. Eldon Brinkerhoff, supra. It is the responsibility of a lessee to prevent his livestock from grazing on land different from that designated in his lease, and appellants' reasons do not provide excuse for the repeated nature of their violations. Cf. State Director for Utah v. Chynoweth Brothers, 17 IBLA 113 (1974); John Gribble, 4 IBLA 134 (1971).

In canceling appellants' leases, the District Manager specifically found insufficient cause shown for not canceling the lease and also relied upon observations of cattle in trespass after issuance of the show cause notice. However, appellants were not given notice nor an opportunity to respond to those trespass violations occurring in September and October 1975 (see n. 1, supra), as required by 43 CFR 4125.1-1(h) and 9239.3-2(a) and (c). Therefore, they should not be considered in the proceedings under the August 1975 show cause notice.

It is a close question whether the circumstances warrant having appellants' leases canceled. On the one hand, they have repeatedly trespassed over a period of years and were aware of some of the consequences of such trespasses. On the other hand, BLM assessed only minimum damages for the prior trespasses and issued the grazing leases subsequent to the violations. However, since the District Manager, in deciding to cancel the leases, relied upon alleged trespasses of which appellants had no notice and which occurred after the August 5, 1975, show cause notice, the decision cannot stand. The Manager should have determined what sanctions to employ without considering the later alleged trespasses, or delayed the imposition of penalties until notice and resolution of the later trespasses. Therefore, the decision must be set aside and the case remanded to the District Office for further proceedings consistent with this opinion.

We note that lease 36057583 expired February 29, 1976; thus the question of cancellation of that lease has become moot. It is premature for us to comment on whether any renewal application should be granted.

[2] Appellants have also requested that a hearing before an Administrative Law Judge be held pursuant to 43 CFR 4.420 et seq. There is no provision in the regulations for hearings as a matter of right involving section 15 grazing leases, as contrasted with

provisions relating to grazing privileges within grazing districts (see 43 CFR 4.470). This Board, in its discretion, may order fact finding hearings. 43 CFR 4.415. In view of the conclusion reached above, there is no reason for ordering a hearing. Furthermore, we point out that ordinarily to warrant our ordering such a hearing, an appellant must at least allege facts which, if proven, would entitle him to the relief sought. Coronado Development Corp., supra; Ruth E. Han, 13 IBLA 296, 304, 80 I.D. 698, 700 (1973). Although appellants "deny any trespass or trespasses that are being relied upon by the District Manager as justification for lease cancellation," they allege no facts disputing the prior trespass violations for which they paid damages. They also admit that livestock grazing in the area do stray. Therefore, appellants' request would be denied in any event.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for further consideration consistent with this opinion.

Joan B. Thompson

Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge